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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

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No. 755

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MUNICIPAL INVESTORS ASSOCIATION,
Appellant,
vs.
CITY OF BIRMINGHAM, a Municipal Corporation, et al.,
Appellees

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## REPLY BRIEF OF APPELLANT

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### I.

### GROUNDS OF JURISDICTION

Appellees admit the jurisdiction of this court. However on pages 2 and 3 of their brief they state that "The court below did not pass upon the possible defense that Appellant would not have had the right to reassess even if no consideration were given to the 1937 and 1939 legislation under attack on this appeal"; that such is a non-federal

question; and that if this court reverses the state court on the question of constitutionality of the 1937 and 1939 legislation, then this court "should remand the case to the Supreme Court of Michigan to decide the non-federal question as to whether any right of reassessment exists apart from the unconstitutional provisions of the 1937 and 1939 statutes."

We can not agree with the above contentions. In the court below Appellant attacked the 1937 and 1939 legislation on the ground that it impaired the obligation of Appellant's bond contract. That attack necessarily involved the very question of whether or not the 1937 and 1939 legislation changed the pre-existing statutes. The 1937 and 1939 legislation considered alone, is not unconstitutional. It is unconstitutional only in relation to the pre-existing statutes which form a part of Appellant's bond contract. Unless a change was made, then there has been no impairment. Before the Michigan court could reach the constitutional question, it had to determine that the Appellant did not have the same right under the 1937 and 1939 legislation which it had under pre-existing statutes.

Granting, for the sake of the argument, that the state court did not pass upon the question of Appellant's right to a reassessment under laws existing prior to the 1937 and 1939 legislation, we can not agree that such is a non-federal question. Appellant's contract is comprised not only of the particular proceedings for the issuance of the bonds in question and the bonds themselves, but also of the then existing provisions of the charter of the Village of Birmingham and the state statutes. This court in *Irving Trust Company v. Day*, 62 Sup. Ct. Rep. 398, 401, said:

> "When this court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and

> the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the federal constitution, and for such purposes finality can not be accorded to the views of a state court."

Therefore, in this case the interpretation of the tax laws existing in 1928 (which were not changed prior to 1937 so far as the issues in this case are concerned) is a matter of determination by this court rather than by the state court.

## II.

## ARGUMENT

We shall discuss Appellees' Points in the following order, viz: III, IV, II and I.

### 1.

### Reply to Appellees' Argument Under Their Point III

The State of Michigan takes the position that this case should not be decided upon its merits because its agency, the State Land Office Board, has agreed with one (not all) of the former owners of property in this special assessment district successfully bidding at the Scavenger Sale, to postpone the execution of the purchase contract. In other words, the State of Michigan is seeking to ward off a decision on the meritorious questions in this case by raising its own voluntary act as a defense. The Appellees, the City of Birmingham and its several officials, do not join in this contention. The determination of the constitutional questions herein involved are exceedingly important, not only in respect to this and various other situations in the City of Birmingham, but also in respect to numerous other situations throughout the state. As long as these constitutional questions remain undetermined, the title conveyed by the state as a result of the Scavenger Sale, will be questionable. No claim is made by the State of Michigan that it has cancelled the sale to this particular purchaser. In fact, according to its own statements it has extended the time for execution of the contract until after the decision of this case (R. 16). The purchaser still retains the right to purchase the property, which it can enforce at any time.

It should be noted that all of the property in this special assessment district, sold at the Scavenger Sale, was not sold to the particular purchaser to whom such extension was given (R. 15) and therefore the argument of the Attorney General is not applicable as to all properties against which an additional assessment is sought.

However, the answer to the entire argument of the Attorney General is found in *Wilson v. City of Pontiac*, 294 Mich. 79, where the Michigan court held that properties sold by the State Land Office Board at the Scavenger Sale become taxable immediately upon such sale notwithstanding any delay in the execution of a deed or land contract. The Michigan court in the present case approved and followed the rule established in the *Wilson* case and in its opinion (R. 21) said:

> "Pursuant to legislative intent the Michigan Supreme Court has held that a taxpayer may bring mandamus to compel a city to place on its tax rolls immediately all parcels of land sold under the 'scavenger' act even though the State land office board had not as yet executed deeds or contracts to the successful bidder; that such lands are subject to taxation when a bid is accepted and notice of sale given by the agent of the board to the county treasurer who in turn is obliged to notify the proper assessing officers. *Wilson v. City of Pontiac*, 294 Mich. 79."

2.

**Reply to Appellees' Argument Under Their Point IV in re Charter Provisions for Additional Assessment**

We discussed the charter authority for additional assessments under Point I of our first brief on pages 15 to 20, inclusive.

Inasmuch as the issues on this appeal are limited to those based upon Appellant's contract rights, the only charter provisions relevant to this discussion are those found in the village charter which formed a part of the bond contract. The allegations in the petition filed in the state court relative to the subsequent city charter assessment provisions, while pertinent there, are of no effect here. Therefore, the discussion in the fore part of page 47 of Appellees' brief should be disregarded.

Even though Appellant's rights were based upon the reassessment provision of the city charter, the case of *State v. Vancouver,* 160 Wash. 655, is not applicable. In that case an additional assessment was authorized "whenever on account of any mistake, inadvertence or other cause the amount assessed shall not be sufficient * * *." The court in that case applied the rule of *ejusdem generis* because the words "or other cause" followed the words "any mistake, inadvertance." The City of Birmingham charter provides for a reassessment "whenever for any cause, mistake or inadvertance the amount assessed shall not be sufficient." Therefore, inasmuch as the general term precedes the specific, the rule of *ejusdem generis* is not applicable.

The fact that the original special assessments were not paid, does not necessarily indicate that the lots are not

worth the amount of the assessments, as stated by Appellees on page 46 of their brief. These lots were sold at the 1938 tax sale because of an accumulated delinquency in the payment of general *ad valorem* taxes as well as in the payment of the special assessments. By reason of such sale and the subsequent so-called Scavenger Sale, these lots are now freed of any general tax obligation and also of the obligation growing out of the original special assessments. Even though an additional assessment may be levied against them, the total tax burden has been greatly decreased.

Appellees say that Section 15 of Chapter XXI of the village charter (R. 6) providing for an additional assessment, should not be applied except in those cases where the actual cost exceeds the estimate (Appellees' brief 45), or in any event should not be applied where the deficiency in the original assessment arises because the state in the exercise of its sovereign power has destroyed the assessment liens (Appellees' brief 46). They cite no authority for either of the above propositions nor do they go further than to state them.

Section 15 of Chapter XXI of the village charter specifies the condition for an additional assessment, in the following language:

> "Should any special assessment prove insufficient to pay for the improvement or work for which it was levied and the expenses incident thereto, the commission may make an additional pro rata assessment to supply the deficiency."

The charter authorized special assessments to defray improvement costs. The village had one of two alternatives—(1) to levy the special assessments and construct the improvement after the collection thereof, or (2) to levy

the assessments, borrow money by the issuance of special assessment bonds, and construct the improvement from the moneys so borrowed. In either case the cost of the improvement is the same.

The above quoted language does not limit the cause of the insufficiency. Appellees would have the court read into the charter provision a limitation upon the cause of the insufficiency. This would require the court to exercise legislative functions and insert by judicial decision such limitation, which of course it can not do.

Section 22 of Chapter XX of the village charter, after providing for the issuance of special assessment bonds, contained the following sentence:

> "Said bonds in no event shall be sold or otherwise disposed of at less than their par value."

Act 273, Public Acts of 1925, is the general law of Michigan governing the issuance of bonds by its political subdivisions. Section 2 of that act (Section 2691, C. L. 1929) as the same existed in 1928 and prior to its amendment in 1931, contained the following provision:

> "No bonds shall bear a higher rate of interest than 6% per annum or be sold at less than par and accrued interest."

Such provisions requiring bonds to be sold at not less than par, are inconsistent with any idea that the village did not intend to provide the means to pay those bonds in full. The chances of full payment would be questionable without the right to make an additional assessment inasmuch as there is always strong likelihood that some assessments may not be paid. Legal authority to provide for full payment of principal and interest is a necessary requisite to a sale at par.

In our original brief on pages 17 to 20, we cited and quoted from the opinions in the cases of *Kadow v. Paul*, 274 U. S. 175, *State ex rel. Frazer v. Holt County Court*, 135 Mo. 533 (375 S. W. 521) and *In Re Dancy Drainage District*, 190 Wis. 327 (208 N. W. 479), in which cases this and the other courts dealt with the question of additional special assessments necessitated by the failure of property owners to pay the original assessments. In those opinions the courts discussed and answered all the questions raised by Appellees under Point IV of their brief.

3.

**Reply to Appellees' Argument Under Their Point II in re Statutory Provisions**

The substance of Appellees' argument under their heading "Point II" is that Appellant's right to an additional assessment was also cancelled under laws existing prior to the 1937 and 1939 legislation and therefore Appellant's bond contract has not been impaired by that legislation.

Appellees in their brief, set forth on pages 16 to 21, inclusive, the various provisions of the tax laws relative to the disposition of property for non-payment of taxes and, on pages 24 to 40, inclusive, the various changes made therein by the 1937 and 1939 laws. In order to avoid any confusion, we desire at the outset to restate the fact that Appellant's claim as to unconstitutionality is limited to those provisions which cancel its right to an additional assessment, and which are set forth in its Specification of Errors. We are not here concerned with the other numerous changes in the tax laws except as they indirectly bear upon the issues before this court. The question, then, for immediate consideration can be stated as follows: What would have been the effect of the tax laws existing prior

to the 1937 and 1939 legislation, upon Appellant's right to an additional assessment, had the title of the state become absolute under such laws?

We repeat and emphasize what we said in our first brief, namely, that prior to the 1937 and 1939 legislation the only statutory provision which cancelled existing ta or the taxing power of a political subdivision, was Section 130 of the general tax laws (1 Comp. Laws, 1929, Section 3524) quoted in part on page 22 of our original brief. As to the effect of a tax deed to the state, this section provides:

> "All taxes charged against such lands in the office of the auditor general at the time they are deeded to the state shall be cancelled, * * *."

We pointed out on pages 24 and 25 of that brief that the additional special assessment claimed by Appellant, being yet unlevied, could not be a tax charged against the lands in the office of the Auditor General and therefore would not have been cancelled under said section. As to the future power to levy taxes against lands so deeded to the state, Section 130 prohibits such levies only until the lands are disposed of by the state.

To uphold Appellees' contention that Appellant's right to an additional assessment is cancelled irrespective of the 1937 and 1939 legislation, would require this court by judicial interpretation to legislate into Section 130, language which would extend the cancellation provisions thereof to taxes not charged in the office of the Auditor General, as well as those which were so charged, and to extend the exemption provisions thereof beyond the time of disposition by the state, in case of an additional assessment.

The cases cited by Appellees on page 22 of their brief, do not support their contention that the tax laws in exist-

ence in 1928, cancelled Appellant's right to an additional assessment. Those cases merely hold that under the former laws when property was deeded to the state under Section 127 (1 Comp. Laws, 1929, Section 3520), the title acquired by the state as between itself and any prior owner, was absolute; that thereupon former titles come to an end; and that after acquiring absolute title, the state can convey the property subject to reservations such as mineral rights, etc. None of the three cases so cited interpret the former tax laws as curtailing a municipal corporation in the exercise of its taxing power after a resale by the state.

The quotation from *Baker v. State Land Office Board*, 294 Mich. 587 (Appellees' brief 23), to the effect that "Inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution" only introduces the issue in this case, namely: Does the Constitution prohibit the legislative acts here complained of?

From the position taken by the Appellees, one might infer that the purpose of the tax laws is to confer some benefit upon the property owner or to grant him some exemption from his obligations, rather than to provide a means for the enforcement of the payment by him of his fair share of the cost of government and of improvements to his property. The provisions of the tax laws relative to tax sales are for the purpose of compelling, not exempting, the payment of taxes. The tax sale procedure may result in the title being lodged in the state. Sections 127 and 130 of the general tax laws provided that in the event taxes should remain delinquent for five years and the land should have been bid in to the state for the taxes of one or more of such years, then the title would become absolute in the state for disposition by it in accordance with law; that existing taxes should be cancelled and that taxes should

not again be levied upon the property until it should be disposed of by the state; but that thereafter it would be subject to the levy of taxes the same as any other property. (1 Comp. Laws, 1929, Sections 3520, 3524.) The statute does nothing more (and nothing more is necessary to accomplish the purpose of the statute) than to cancel the taxes which at the time of the deeding to the state, had been levied and to prevent future assessment of taxes until the state sells the property. There is therefore no reason to read into said Section 130 any provision cancelling any tax which at the time of the deed to the state, is not charged against the lands in the office of the Auditor General (and an additional assessment could not be so charged prior to the levy thereof). Why should the court construe said Section 130 to exempt such property from an additional special assessment, whereas the property lying next thereto, whose owner has promptly met his obligations, is subject to such an additional assessment.

We therefore submit that had it not been for the passage of those provisions in the 1937 and 1939 legislation herein complained of, Appellant's right to a reassessment would not have been cancelled, and that it is the latter legislation only which cancels that right. The Michigan court evidently was of the same opinion.

Appellees have misconstrued our purpose in citing the case of *Case v. City of Saginaw*, 196 Mich. 687. We appreciate that the decision in that case, being by a divided court, is not a precedent. We rely not upon that case but upon the above referred to provisions of Section 130 of the general tax laws (1 Comp. Laws, 1929, Section 3524). We cited *Case v. City of Saginaw* as the only case considered by the Supreme Court of Michigan in any way involving the effect of a deed to the state upon special assessments, and also to show that the Michigan court

divided even upon the question of the effect of such a tax deed upon instalments of an *existing* assessment.

In answer to the statements made in Subdivision 3 beginning on page 41 of Appellees' brief, we suggest that the Appellant was not required under its contract to bid in the property at the tax sale, which would have required a bid equal not only to the special assessments, but also to the general taxes, nor to purchase at the Scavenger Sale which would have given the former owner the right to match its bid, but had the right to rely upon that part of its bond contract which provides an additional assessment to pay its bonds.

4.

**Reply to Appellees' Argument Under Their Point I in re Reserved Sovereign Power**

Appellees contend that the 1937 and 1939 legislation was enacted under the state's reserved sovereign power and is not subject to the limitations of the contract clause of the constitution and in support of this contention, they cite the cases of *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, and *Veix v. Sixth Ward Building and Loan Ass'n*, 310 U. S. 32, neither of which cases, in our opinion, sustain their position. The quotation from the *Blaisdell* case found on page 7 of their brief, is but a preliminary statement leading up to that found on page 439 of the reported opinion and which appears on page 38 of our former brief. In the latter statement, after declaring that the reserved power of the state and any limitations thereon (such as the contract clause) "must be construed in harmony with each other," the former Chief Justice of this court says:

> "This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them" (290 U. S. 439.)

It must be remembered, too, that the *Blaisdell* case was not dealing with the destruction of contract rights but with a statute which merely postponed the time when the mortgagee could obtain possession of the foreclosed property and which in the meantime protected his interests. The majority opinion in that case suggested that the statute was as much for the benefit of the mortgagee as the mortgagor.

In *Veix v. Sixth Ward Building and Loan Ass'n, supra*, cited by Appellees, this court was dealing with the constitutionality of the 1932 amendment to that part of the New Jersey building and loan association statute regulating the withdrawal by shareholders of their investments in such associations. Prior to the 1932 amendment, shares in such an association could be withdrawn upon not to exceed thirty days' notice, in the order in which notices were received, from not more than one-half of the receipts in any month, with right to sue at the end of six months. The principal changes made by the 1932 amendment were that if in any one month the funds required to be payable for withdrawals were insufficient to pay all required withdrawals, withdrawing members were to receive $500.00 each in order of priority until the fund for withdrawals was exhausted, and that so long as the funds of the association were applied as required by the amendment, no member could sue. The 1932 amendment was enacted subsequent to the time Veix purchased his shares in the association but prior to the time when he gave notice of withdrawal. The New Jersey statute was dealing with rights

as between the various members of the association. The events of the early thirties had revealed certain inequities in the rules governing withdrawals as set forth in previous statutes. As stated by the court the liquid portion of the assets of building and loan associations were being rapidly drained off by their customers, leaving long term investments and depreciated assets as an inadequate source for the payment of remaining liabilities. The act therefore was designed to prevent one shareholder being able to withdraw his entire investment before another shareholder whose means of locomotion perhaps did not permit him to reach the association's office quite as rapidly, could receive any part of his investment. In the *Veix* case the statute was attempting to equalize equities as between individual shareholders, while in the present case the 1937 and 1939 legislation, as interpreted by the Michigan court, created inequities as between property owners in the same assessment district by cancelling the right to levy an additional assessment in the future against the property of a delinquent taxpayer but not against the property of one who has promptly paid his tax obligations.

Appellees frequently cite and quote from *Baker v. State Land Office Board*, 294 Mich. 587. As we have stated before, the only question before the court in that case in respect to special assessments was whether or not the 1937 and 1939 legislation cancelled *assessments already in existence* at the time of the 1938 tax sale, even though some instalments thereof might be payable in the future. The court there was not in any way dealing with the right to an additional assessment which might be made at some future time after the property had again been restored to private ownership. This must be borne in mind in reading the various quotations from that case. Here we are concerned with a right, the exercise of which is made neces-

sary by the decision in the *Baker* case cancelling existing assessments.

Appellees attempt to distinguish the case of *W. B. Worthen Company v. Kavanaugh*, 295 U. S. 56, by saying at the top of page 14, that the statutes in that case were "well planned to make these benefit assessments an acceptable security." Are we to infer that the State of Michigan, in granting to villages the power to assess and re-assess (1 Comp. Laws, 1929, Section 1786) and the electors of the Village of Birmingham in providing for an additional assessment in their charter, did not plan to make the bonds in question an acceptable security? Are we to infer that the Village of Birmingham intended that the additional assessment provision of its charter, was only a sham? Appellees further attempt to distinguish the *Worthen* case by saying that the Arkansas legislation was enacted in a spirit of oppression (page 14). No such statement was made by this court. The court did say: "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bonds must be respected" (295 U. S. 56 at 60).

We repeat again that in our opinion the decision of the Michigan Supreme Court can not be affirmed by this court without the reversal of the decision in *W. B. Worthen Company v. Kavanaugh, supra.*

## III.
## CONCLUSION

In conclusion we state:

(1) That under the provisions of Section 15 of Chapter XXI of the charter of the Village of Birmingham (the effective charter at the time of the issuance of the bonds), Appellant is entitled to an additional pro rata assessment to supply the deficiency in the special assessment bond fund.

(2). That the statutes existing at the time of the issuance of Appellant's bonds, did not cancel its right to an additional assessment, inasmuch as such statutes cancelled those taxes only which were charged against lands in the office of the Auditor General at the time of the deeding of the same to the state (1 C. L., 1929, Sec. 3524).

(3) That the cancellation effected by the 1937 and 1939 legislation destroys Appellant's sole remedy and therefore impairs the obligation of its contract and deprives it of property without due process of law, contrary to the Federal Constitution.

(4) That to affirm the decision of the Michigan Supreme Court would require this court to reverse its decision in *W. B. Worthen Company v. Kavanaugh*, 295 U. S. 56.

(5) That the reserved sovereign power of the state does not permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398 at page 439.

(6) That we are not contending that the 1937 and 1939 legislation be declared unconstitutional in its entirety but only as it attempts to cancel the right to an additional

assessment under the circumstances of this case where there remains no other remedy.

(7) That an additional assessment to meet deficiencies in a special assessment bond fund, where the original assessments have been cancelled, is in the same category as a future *ad valorem* tax to meet a deficiency in a general obligation bond fund, where the original taxes have been cancelled. To permit the state to cancel the one would permit it to cancel the other and the result would be general repudiation of bonded indebtedness.

(8) That even though the state is unable to cancel the right to an additional assessment, the property in question still will have received the benefits of the cancellation of an accumulation of approximately ten years of *ad valorem* taxes.

(9) That it would be unfair to permit the owners of the lots in question to enjoy the benefits of the improvements without contributing to the payment thereof.

(10) That the legislation herein attacked, attempts to confer a benefit upon certain property owners at the expense of bondholders and other property owners.

We therefore submit that the judgment of the Supreme Court of the State of Michigan should be reversed:

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